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Gamification: How to Make Money and Stay Out of Jail

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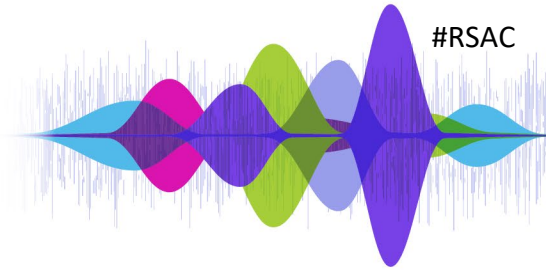
Agenda



- What are they? (With some numbers)
- Basic Gambling Law Principles
- Chance-Based Games and Mechanisms
- Skill Games
- Recent Legal Developments
- Okay, but what about the "avoiding jail" part of this talk? How do I do that?

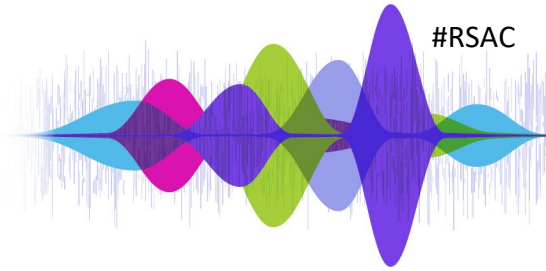
Why Do We Play Games?

- Competition
- Unpredictability
- Because they are fun
- To pass the time
- Games are seeping into all aspects of life

Social Games Industry - Evolution

- In 2007, the social games phenomenon was introduced to the world through Facebook.
- In 2013, there were over 750 million people worldwide playing social games.
- In 2024, over 3 billion.

Social Games Are a Big Deal



- In 2024, the global games market will generate $187.7 billion
- Mobile gaming responsible for 48% of global revenue
- Mobile player growth was projected to reach 2.85 billion by 2024, generating revenues of $92.6 billion

Statistics: newzoo, 2024

Where can you find gamers?

Everywhere… The top 5:

Market	Revenue (USD)	Players
United States	46.7B	214.5M
China	44.6B	681.1M
Japan	18.4B	73.6M
South Korea	7.4B	33.5M
Germany	6.6B	51.0M

Statistics: newzoo, 2023

Today's Games and Rewards

- Puzzle games – match-3 and others
- Casino-style, play-for-fun games, with and without accompanying sweepstakes
- Skill games for money
- Adventure games, including MMORPG games
- Rewards range from virtual, in-game (e.g., avatars, trophies, items) to real-world currency or merchandise

Gamification!

- Financial savings

LONG GAME

LAYUP

- Education

duolingo

- Health-care goals

fitbit

every move

- HR/workplace

spinify

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Gambling Law

The World Is Not Monochromatic

- Gambling laws vary widely from country to country
- Some countries construe the term more broadly than others
- I am a US lawyer!

State Laws

- Gambling generally requires 3 elements:
  - **Consideration:** The payment of something is required to play the game
  - **Chance:** The outcome of the game is influenced by chance
  - **Prize:** Money, money's worth, additional plays, or something or real world/tangible value is awarded based on game play.
- Evaluation of these games requires assessment of those elements, which is not always simple or straightforward.

Sweepstakes

- What about those bottlecap promotions?
- Meet the Free Alternative Method of Entry
- Some limits, state-by-state, notably:
  - "Clearly occasional and ancillary to the primary business of that person"
  - Some states require sweepstakes to be temporary
  - Questions surrounding use of mail-in AMOE
  - Registration required in NY and FL if prize exceeds $5k

Federal Laws

- "Unlawful internet gambling" means a "bet or wager [that] is unlawful **under any applicable Federal or State law** in the State or Tribal lands **in which the bet or wager is initiated, received, or otherwise made**."
  - UIGEA; 31 U.S.C. § 5362(10)(A).
  - The intermediate routing of electronic data are not considered in that determination.
- Wire Act prohibits using a wire communication facility (such as the telephone or internet) to transmit "bets or wagers on any sporting event or contest." 18 U.S.C. § 1084.
- Other statutes relying on underlying violation of Wire Act or state laws.

Regulatory Overlay

- "Reg GG" (required by UIGEA)
- Applies to financial transaction providers, although platforms and others have adopted similar models
- If may be gambling, will need to provide a **reasoned legal opinion** that it is **not** gambling and may need to geo-locate users
- Payment processing and platform access are gating issues for success; hence, this has become a de facto requirement for gaming operators

Why Do I Care?

- Game may be rejected by app store or platform
- Payment processing may not be available
- Partners in regulated industries may refuse to participate
- Class-action lawsuits
- State AG cease-and-desist and similar actions
- Jail!

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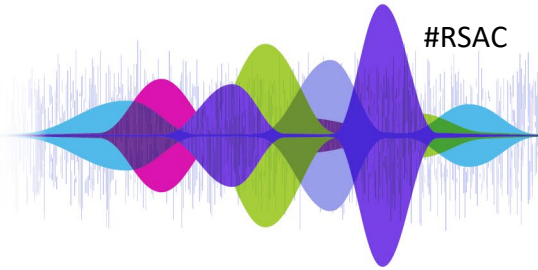
Social Games

The Basics of Social Games



- Common characteristics of social games:
  - Generally played for entertainment
  - Game play is typically (not always) very simple
  - Played through social networks
  - Players may play at little to no cost
- Many games are designed with **social interaction** and **competition** among players in mind

Social Games – Business Models

- Generally, there are **two business models** employed in the social games industry:
  - Up-front cost for the game or application - e.g., Angry Birds

    → Not at issue here
  - Free game or application with in-game purchases available to enhance the entertainment experience or linked to another paid product or service

    → Dominant model

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Chance-Based Games or Mechanics

Casino-themed Social Games

- Play purely for fun, winning virtual coins that can be used to play the game
- Resemble slot machines, blackjack, roulette, bingo and the like
- All chance-based
- Have drawn some controversy

Sweepstakes-Style Games as Promotions

- All involve chance and rely on "sweepstakes" model
- They award cash, merchandise or some other undeniable prize of value (most states don't have the WA statutory formulation)
- Yes, cryptocurrencies count!
- Some use in other sectors (such as financial services)

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Skill Games

Skill Games

- A growing segment

avia
Quick to play, quick to win

skillz

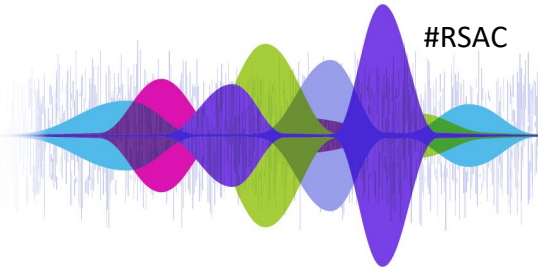
PAPAYA

moneybowl
By Bovada

Skill Games

- These games typically involve payment **and** prize
- Thus, key is “chance”; states have one of three standards
  - Predominance
  - Material Element
  - “Any chance”
- Evaluating quantum of chance is extremely challenging
- Predominance = 51%, but how measured?
- What is “material”? 10%? 20%? No clear answer
- And how measure – what metrics?

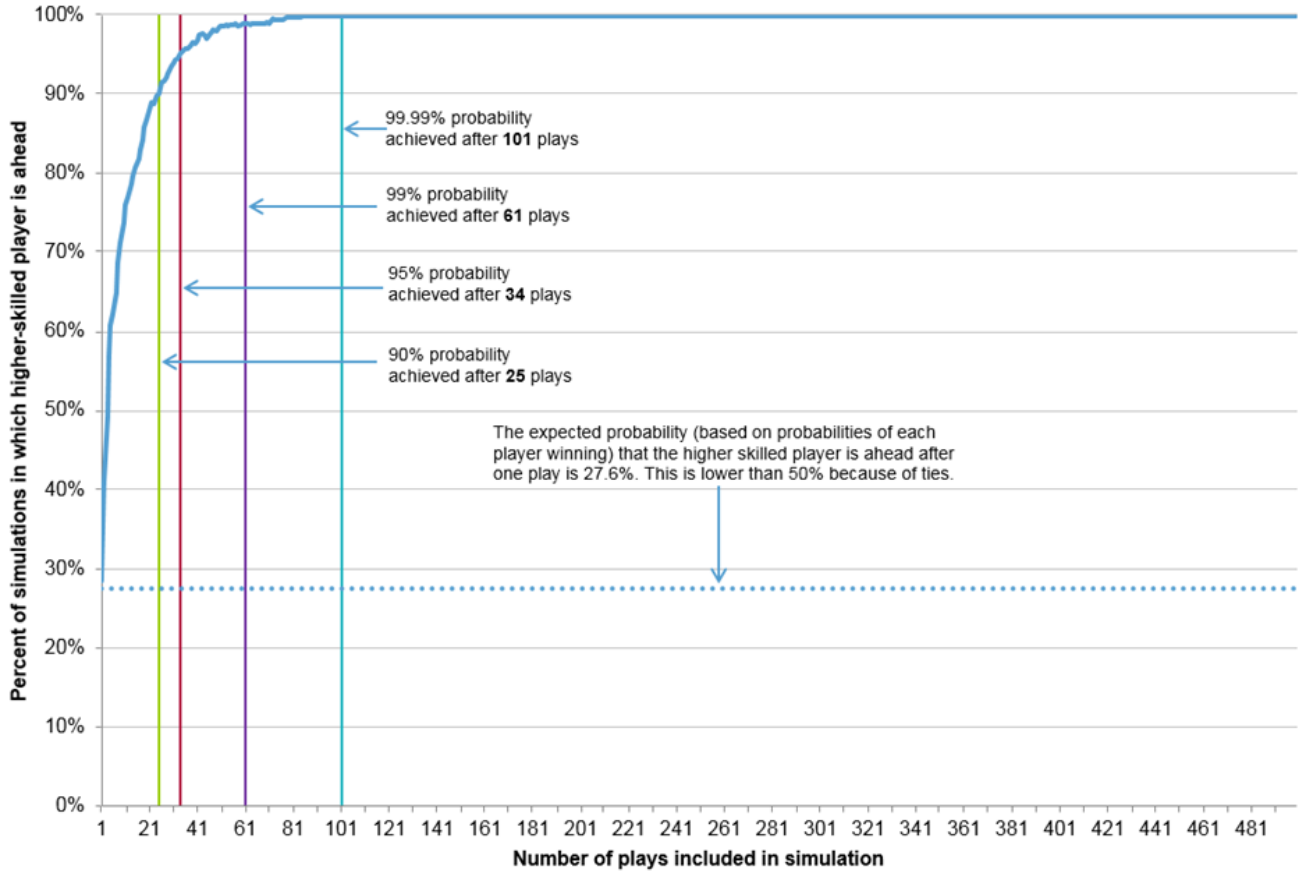
Different Types of Analyses



- There are different ways to measure skill
- Example 1: the “experience” test
  - Compare experienced players to novices and examine whether better game outcomes are associated with more play. If so, indicates a “learning curve” – i.e., that there is a skill to be mastered
- Example 2: the “correlation of win rate to skill” test
  - Compare win rates of “high-skill” and “low-skill” players. Possibly use AI as stand-in for players.
- Example 3: the “past success” test (accepted by *DiCristina* court)
  - Assess each player’s skill based on actual results, then group them into more and less skillful cohorts. Use **other** game results to determine the relative importance of the difference in skill between them.

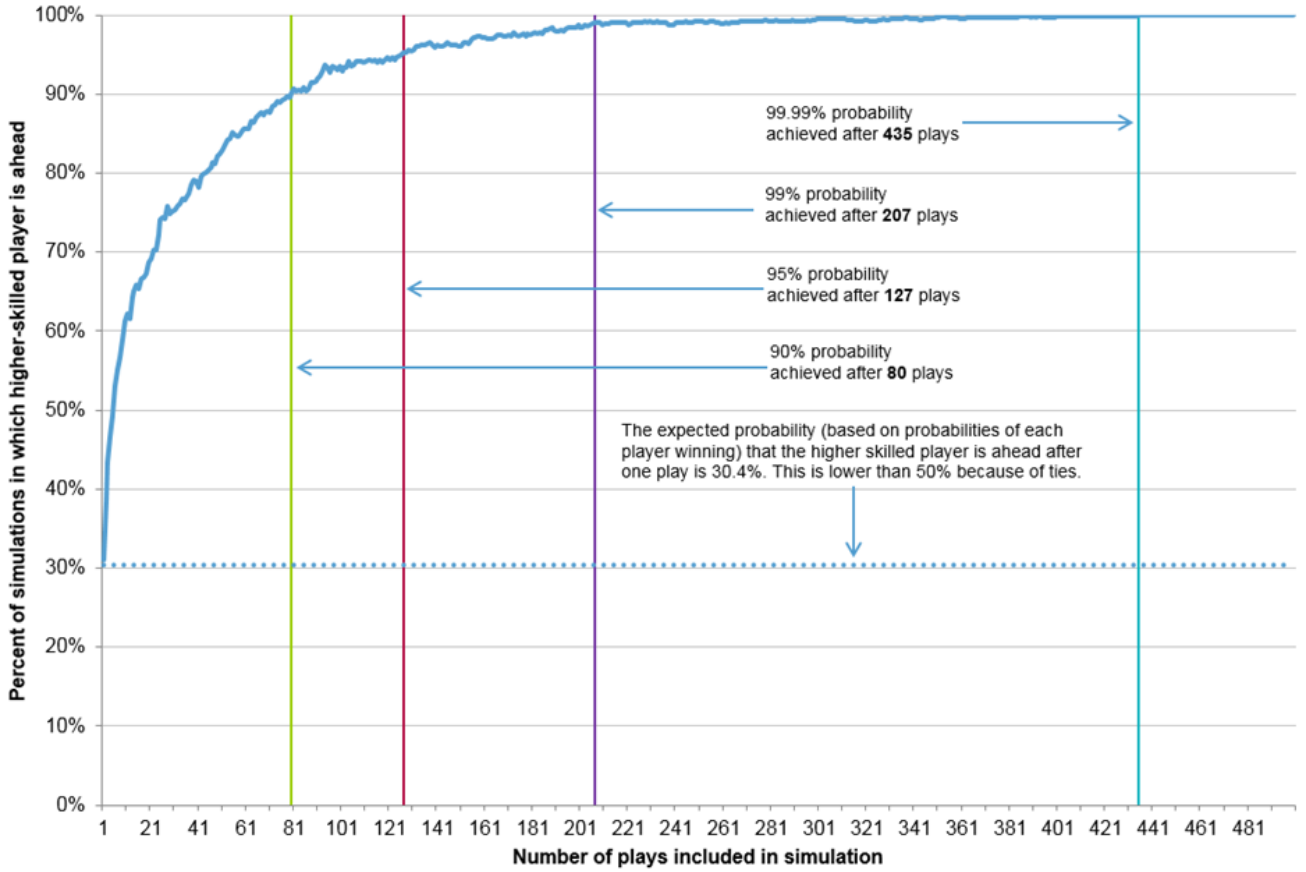
"Experience" Test

- Number of plays required for a more experienced player to prevail over an inexperienced player


Percent of simulations in which higher-skilled player is ahead
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
1 21 41 61 81 101 121 141 161 181 201 221 241 261 281 301 321 341 361 381 401 421 441 461 481
Number of plays included in simulation
99.99% probability achieved after 101 plays
99% probability achieved after 61 plays
95% probability achieved after 34 plays
90% probability achieved after 25 plays
The expected probability (based on probabilities of each player winning) that the higher skilled player is ahead after one play is 27.6%. This is lower than 50% because of ties.

"Past Success" Test

- Number of plays required for a player whose past success indicates greater skill to prevail over a player whose past success indicates lesser skill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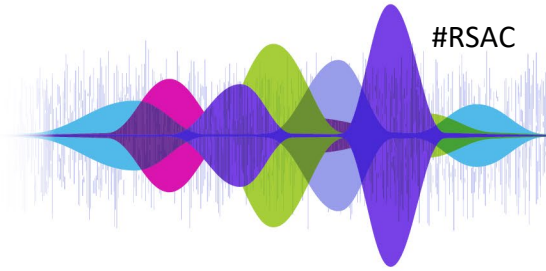
70%
60%
50%
40%
30%
20%
10%
0%
1 21 41 61 81 101 121 141 161 181 201 221 241 261 281 301 321 341 361 381 401 421 441 461 481
Number of plays included in simulation
99.99% probability achieved after 435 plays
99% probability achieved after 207 plays
95% probability achieved after 127 plays
90% probability achieved after 80 plays
The expected probability (based on probabilities of each player winning) that the higher skilled player is ahead after one play is 30.4%. This is lower than 50% because of ties.

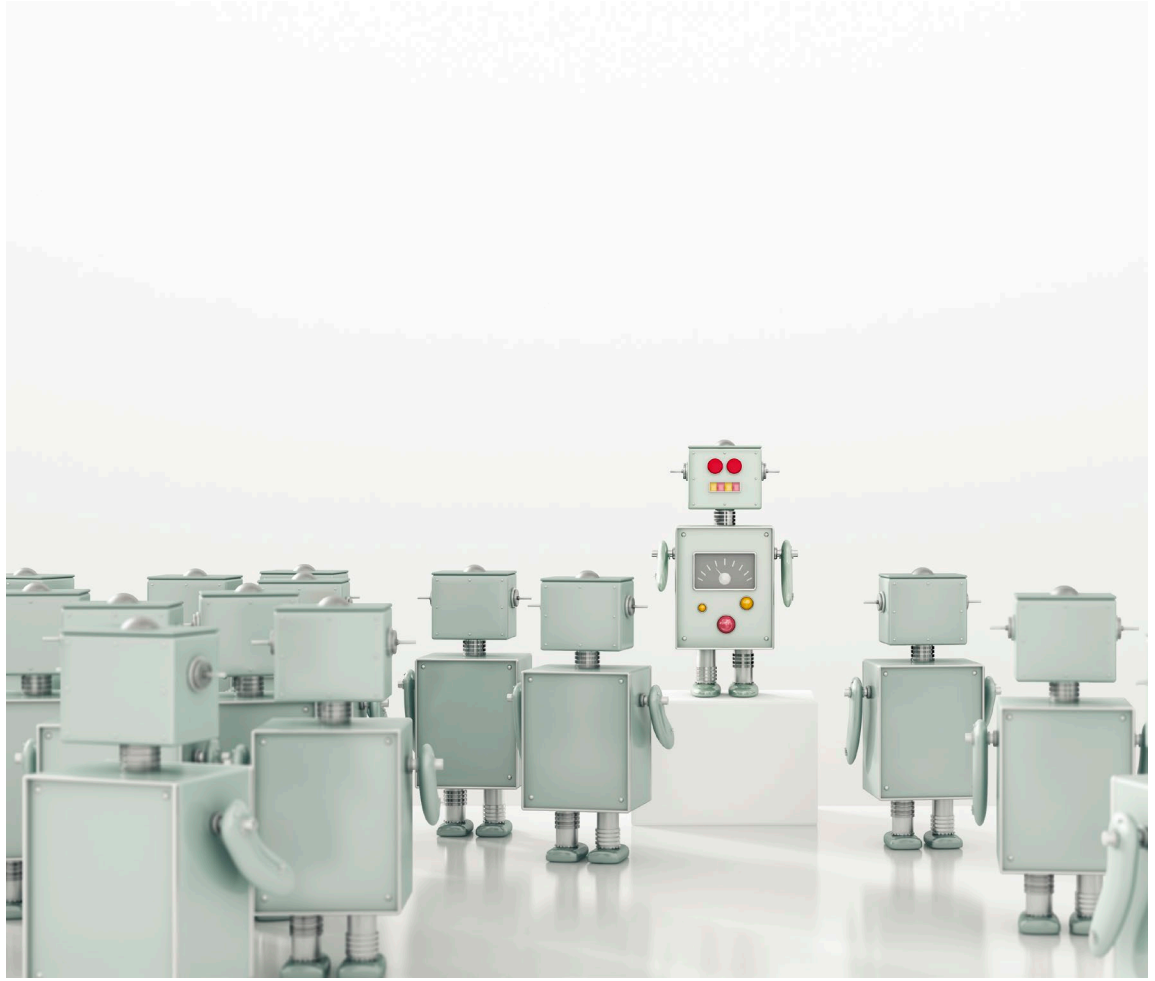


Complicating Factors

- Length of play before skill advantage reveals itself
- How many players play enough to reach the relevant probability threshold?
- How demarcate low and high skill players for purposes of the “experience test”?
- What probability threshold suffices?
- How do varying pay-ins and pay-outs affect the data?

Skill Games

- **Banked games** – where operator participates and has an interest in the outcome:
  - Prohibited in some states or subject to tighter regulation
  - Use of bots – allegedly transforms head-to-head skill games into banked unlawful games of chance
  - Focus on representations made by companies about involvement of bots and whether games accurately described as "skill games"



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Recent Developments

Casino-Themed Social Games

- In 2015, one plaintiffs' firm brought at least 6 lawsuits against various casino-themed social and adventure/MMORPG games, including:
  - Game of War, Big Fish Casino, DoubleDown Casino, Castle Clash and Slotomania.
- All games operated on a freemium model.
- Plaintiffs brought claims under state gambling loss recovery laws or unfair competition/deceptive trade practices
- All suits were decided in favor of defendants, until Ninth Circuit decision in *Kater,* which has created some uncertainty in market

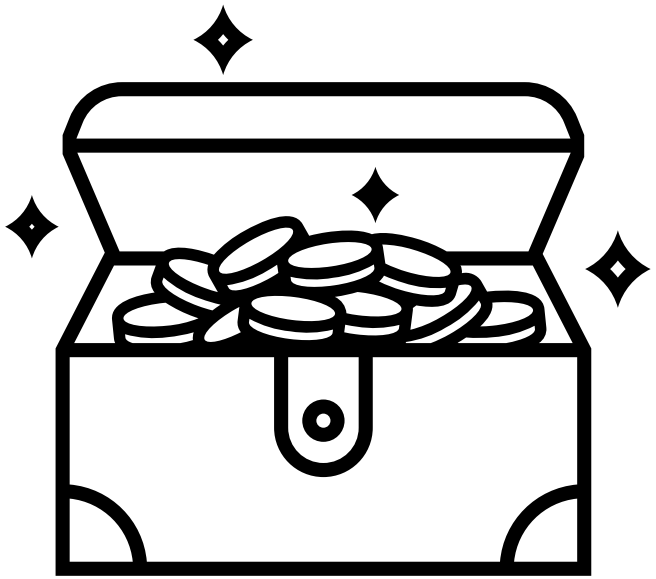
Recent Litigation Developments

- "Statute of Queen Anne"
- Increasingly popular cause of action
  - Pokerstars $1B judgment
  - Churchill Downs $124M settlement
  - Many others
- Dozens of cases, either by players or third parties ("mass actions")
- Most targeting traditional social casino or social casino with sweepstakes, but also have involved lootboxes and match games

Casino-Themed Social Games

- *Kater v. Churchill Downs* [9th Cir. 2018]: virtual coins = **something of value** because they extend the privilege of playing the game.
- Since *Kater*: cases in WA have settled with adoption of "**continuous play**" feature.
- **BUT** other courts have looked closely at what might suffice - e.g., *Larsen v. PTT* [W.D. Wash 2024]*; Ochoa v. Zeroo Gravity* [C.D. Cal. 2024]
- Difference between **extending** and **enhancing** gameplay?

Loot Boxes



- In-game purchases of virtual containers via real money or in-game currency. Award players with virtual items or game modifications
- No US court has found loot boxes to be illegal gambling:
  - Lawsuits against Google and Apple alleging that loot boxes = illegal gambling
  - *Taylor v. Apple; Coffee v. Google* [N.D. Cal. 2020]: not gambling because features rewarded are not things of value transferable outside of game, with no measurable worth.
  - *Mai v. Supercell Oy*: non-monetary prizes with only subjective value are not a thing of value under CA law.

Recent Sweepstakes Developments

- **AGA Statement**: attacked lack of regulatory oversight: risk to consumers (no self-exclusion or testing for fairness), lack of investment in communities, lack of tax contributions
- Michigan, Delaware, Connecticut, Maryland, West Virginia: all reportedly have issued **cease and desist** letters or subpoenas
- **NCLGS Model Internet Gaming Act**: Ch. 20: Operation of online sweepstakes prohibited:
  - **Online Sweepstakes Game:** Any game, contest, or promotion, in which a prize is awarded based on chance, that is available on the internet and accessible on a mobile phone, computer terminal, or similar access device, that utilizes a dual-currency system of payment allowing the player to exchange the currency for any prize or award or cash or cash equivalents, and simulates casino-style gaming, including but not limited to, slot machines, video poker, and table games, lottery games, and sports wagering.
- **Legislation proposed** in multiple states

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• 3020 Lehigh St., Allentown
• 2157 Macarthur Rd., Allentown
• 1321 Union Blvd., Allentown
• 3rd & Riverside Dr., Easton
• 25th St. Shopping Center, Easton
• 660 Memorial Pkwy., Phillipsburg, N.J.
• Rt. 309, Quakertown
• Lehigh Valley Mall, Whitehall
McDonald's

Takeaways?

- Ever-increasing popularity
- Increasing focus on sweepstakes elements
- Risk factors:
  - Awarding cash or merchandise
  - For sweeps: not promoting a bona fide good or service
  - For sweeps: not granting AMOE true equal status (chance of winning)
  - Not differentiating among the states where warranted

Data Analytics

- What you don't know can hurt you
- Track "unhealthy" or illicit play
  - DFS example – "insider" play
  - "Bet the mortgage" problems
- Skill gaming – support characterization of game
- Analytical rigor is required

Stay Out of Jail (aka the "Apply" Slide)

- Understand the purpose and monetization model behind your game
- If you are a "pure" game model (not a non-game good or service), evaluate whether to offer cash/merchandise very carefully and be prepared to "justify" the game beyond the prize
- For skill games, understand the skill elements and be prepared to undertake a rigorous data analysis
- Formulaic legal recitations often will not suffice; neither will a general focus on "federal laws" or "general state principles"

- **Be prepared for a substantial legal and compliance investment**
- **Be prepared to distinguish among states and countries**

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